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Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-786

GRANT MOGLE,

Petitioner,

v.

BOARD OF EDUCATION OF SEVIER COUNTY SCHOOL DISTRICT, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 540 F.2d 478, and is reproduced in the Appendix to this Petition at p. 2a. The unreported final order of the District Court, issued without opinion, is reproduced at p. 1a.

JURISDICTION

The decision and judgment of the Court of Appeals were entered on August 11, 1976. By order dated October 29, 1976, Mr. Justice White extended the time

for filing a petition for a writ of certiorari to and including December 9, 1976. This Court has jurisdiction to review the judgment by writ of certiorari under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Does the Fourteenth Amendment preclude a rural public school system from terminating the employment of a school counselor solely because he does not reside within the school district, where (a) the same residence requirement has not been applied to other categories of school employees, (b) there has been no showing that the counselor has not properly performed all the duties of his job, and (c) his failure to reside within the district was caused by his inability to find suitable housing?

2. Is the constitutionality of a residence requirement for public employees to be determined under the Equal Protection Clause by application of the "compelling governmental interest" standard or the "rational basis" test?

3. Irrespective of which standard is applicable, may a court accept the asserted *post hoc* justifications for the residence requirement at face value without any inquiry as to whether those justifications are bona fide and supported by the facts?

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the Constitution, Section 1, provides in pertinent part as follows:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State

> deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

The Facts

Petitioner was employed under three successive annual contracts as a guidance counselor and teacher in the North Sevier High School, located in Salina, Sevier County, Utah. His contract was not renewed for the 1972-73 school year—although there was never any complaint about the quality of his performance—solely because he failed to move his residence from an adjacent county to the North Sevier area.

Salina, Utah is a small rural community with a population of approximately 1500. At all times pertinent to this case, petitioner has resided in the small town of Centerfield (population 420) in neighboring Sanpete County, about 11 miles from the North Sevier High School. Although petitioner had previously taught in other schools in Sevier County while living in Centerfield, he was told at the time he was offered the high school job that "we would like you to move over." He was not told at that time, however, that this was an absolute condition of employment. Petitioner did look for a home in Salina, but was unable to find one which could accomodate his large family (petitioner has six children) at a price which he was able to afford.

In 1971, after petitioner had held his job for two years, the Superintendent asked him when he was going to move. Petitioner replied that he had tried to find a suitable home, but that none was available.

The Superintendent then suggested that petitioner move into a "mobile home" or a "pre-fabricated home."

In March 1972, the Superintendent told petitioner that he might not be offered a new contract if he failed to change his residence. Petitioner then requested an opportunity to appear before the School Board, and he was given five minutes at a meeting in April 1972. The only explanation for the residence requirement offered by School Board members at that meeting was that since petitioner was being paid in Sevier County, he ought to be living and paying taxes in Sevier County. When petitioner pointed out that no such requirement had been imposed on another teacher who also lived in Centerfield, he was told that she had been hired when teachers were scarce and it was not expected at the time that she would stay for more than one year.

Shortly thereafter, petitioner received his 1972-73 school year contract with the following sentence typed in: "For this contract to be valid, you must be living in the North Sevier area by the beginning of the 1972-73 school year." Such a clause had never appeared in any other employee's contract.

Petitioner then renewed his search for a home in the North Sevier area. He listed his own home for sale and sought FHA financing for a new residence, but was still unable a find a house which could accomodate his family. Notwithstanding these efforts, he was denied renewal of his employment contract for the following year.

Petitioner then filed the present action, based on 42 U.S.C. §§ 1983 and 1985, claiming that the termination

of his employment violated his constitutional rights, including his rights under the Equal Protection Clause of the Fourteenth Amendment. Respondents moved for summary judgment, asserting for the first time that the residence requirement imposed upon petitioner was applicable only to school counselors, not teachers. In an affidavit filed in support of their motion, respondents stated the following reasons for the requirement:

> "Certain services were not being provided students in the North Sevier High School attendance area because the counsellor lived outside that attendance area;
>
> "It is difficult for parents and students to get in touch with the counsellor because of the distance problem;
>
> "It is difficult for parents and students to become personally acquainted with the counsellor;
>
> "It is more difficult because of folk-ways and mores for the counsellor to become acquainted with the community and its problems and feelings are generated in the community that the counsellor is an 'outsider' and his allegiance to the high school is in jeopardy as the result of living in another county;
>
> "The counsellor's knowledge of career opportunities is more limited because he is not living in the community and having first hand knowledge of those career activities;
>
> "The counsellor is unable to make any contribution of services to the community in civic and church activities, is not immediately available for personal contact by police officers, clergymen, doctors, principals and other service agencies and a long distance call is required if a counsellor is contacted at home by students or parents or both;

> "A counsellor is responsible for cumulative records of the students and it is inconvenient for him to live a long distance from where the records are kept; there is a substantial demand upon student record data in spring and early fall." (15a-16a).

In response, petitioner filed an affidavit stating that he was never advised of any of the foregoing reasons prior to the time his employment was terminated, and that never during his employment "was he asked by any person employed by the Board of Education to work longer hours or to make himself more available to the students or faculty members of the High School." Petitioner testified on deposition that he was at the High School from 6:30 a.m. until 4:30 p.m. each day, in addition to evening and weekend attendance at football and basketball games. He also testified that the principal of his school had told him that "as long as I could get to school and perform the responsibilities that were given me, that's all he was concerned about." Finally, petitioner's evidence showed that, far from being an "outsider" as suggested in respondents' affidavit, he is a life-long area resident, born in nearby Manti, educated in Utah schools and universities, a member of local clubs and fraternal groups and, like most of the local population, a Mormon.

The Decisions Below

The District Court granted respondents' motion for summary judgment in a brief order which stated that "no substantial federal question is raised by plaintiff's claim." (1a).

The Court of Appeals disagreed with the District Court's view that no substantial federal question was

presented (15a), but nevertheless affirmed. Relying on this Court's summary dispositions of appeals in two prior cases (*McCarthy* v. *Philadelphia Civil Service Commission,* 424 U.S. 645 (1976) and *Detroit Police Officers Assn.* v. *City of Detroit,* 405 U.S. 950 (1972)) the Court of Appeals concluded that a residency requirement for public employment is not to be reviewed under the compelling governmental interest test, as petitioner had contended, but rather under the less stringent standard generally applied in equal-protection cases. Viewed in light of the latter standard, the court held that the School Board's policy and its application to petitioner did not violate the Equal Protection Clause, despite the fact that the reasons for that policy "were apparently not articulated until during the preparations in this case". (12a). Although the court noted that "there was only an eleven mile distance from [petitioner's] home to Sevier" and that "the very small communities involved present no problems of the magnitude of those of large cities"—such as those involved in prior cases upholding residency requirements—the court concluded that the School Board's reasons "are not wholly insubstantial" and its policy must therefore be presumed to be valid (12a-13a).

REASONS FOR GRANTING THE WRIT

I

The question whether, or in what circumstances, a governmental body may constitutionally require its employees to reside within the jurisdiction in which they are employed is one of major importance, which should be definitively resolved by this Court. This issue has been the subject of extensive litigation and conflicting decisions in the lower courts, both state and

federal.[1] Its importance is underscored by the large number of jurisdictions which have adopted residence requirements for some or all of their employees.[2]

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[1] In addition to *McCarthy* v. *Philadelphia Civil Service Commission, supra,* we are aware of 11 other cases involving public employee residency requirements that have been decided since 1970. In three of these such requirements have been held to be unconstitutional. *Hanson* v. *Unified School Dist. No.* 500, 364 F.Supp. 330 (D. Kan. 1973); *Donnelly* v. *City of Manchester,* 111 N.H. 50, 274 A.2d 789 (1971); and *Hunter* v. *Fraternal Order of Police,* — Ohio App. —, — N.E.2d — (1975), *cert. denied,* 424 U.S. 977 (1976). In a fourth, a 3-judge court held that such requirements must be supported by a compelling state interest but concluded that such test was met in the case of policemen. *Krzewinski* v. *Kugler,* 338 F.Supp. 492 (D. N.J. 1972). In the remaining cases residence requirements have been upheld on varying grounds. *Wardwell* v. *Board of Education of Cincinnati,* 529 F.2d 625 (6th Cir. 1976); *Wright* v. *City of Jackson,* 506 F.2d 900 (5th Cir. 1975); *Ahern* v. *Murphy,* 457 F.2d 363 (7th Cir. 1972); *Ector* v. *City of Torrance,* 10 Cal. 3d 129, 514 P.2d 433 (1973), *cert. denied* 415 U.S. 935 (1974); *Detroit Police Officers Assn.* v. *City of Detroit,* 385 Mich. 519, 190 N.W. 2d 97 (1971), *appeal dismissed,* 405 U.S. 950 (1972); *Abrahams* v. *Civil Service Commission,* 65 N.J. 61, 419 A.2d 483 (1974); *Hattiesburg Firefighters Local 184* v. *City of Hattiesburg,* 263 So. 2d 767 (Miss. 1972).

[2] A survey of cities of 10,000 or more population, conducted in 1967, found that 37% required all public employees to live within the city, and another 46% had residence requirements directed at specific types of employees, such as department heads and public safety personnel. The same survey showed that 28.4% of all suburban jurisdictions required residency for all public jobs, and that 52.9% imposed residency rules on selected types of positions such as managers and public safety personnel. International City Managers Association, *The Municipal Yearbook,* 1967, Table 2, p. 160. See also U.S. Commission on Civil Rights, *For All the People, By All the People* (1969), p. 53.

In a subsequent survey, in 1970, of 200 urban counties, it was found that 45.3% required all public employees to live within the county, and that 17.6% had such requirements for managerial and public safety personnel. International City Managers Association, *The Municipal Yearbook,* 1970, Table V, pp. 182-186.

Although this Court addressed the issue last Term in its brief per curiam decision in *McCarthy* v. *Philadelphia Civil Service Commission, supra,* that case, which was decided without benefit of briefs and oral argument, presented the problem in a totally different context than is involved here. *McCarthy,* as well as the other cases cited by the Court's opinion,[3] all involved large cities—Philadelphia, Detroit, Cincinnati—which are plagued by problems of urban decay, a deteriorating tax base, racial tension, and middle class flight to the suburbs. The residence rules at issue in those cases were expressly related to those problems, and represented an effort by the cities involved to avoid a situation in which an absentee and largely white civil service would rule over a largely black and low-income urban population. It was in that context that those residence requirements were upheld.

This case, however, presents an entirely different situation. Sevier County, Utah has none of the social problems which confront the large cities of America. What is involved here is a residence rule adopted by a rural school board, the sole effect of which was to exclude from public employment a single individual who was unable to find affordable housing for his large family within the community in question. Surely the considerations which prompted this Court's summary affirmance in *McCarthy* are not necessarily applicable here.

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[3] *Detroit Police Officers Assn.* v. *City of Detroit,* 385 Mich. 519, 190 N.W. 2d 97 (1971), *appeal dismissed* 405 U.S. 950 (1972) (upholding a residence requirement for Detroit policemen); *Wardwell* v. *Board of Education of Cincinnati,* 529 F.2d 625 (6th Cir. 1976) (upholding a residence rule for Cincinnati teachers).

Nor is this case unique. As the data cited above indicate (see note 2, *supra*), residence rules for public employers are being adopted by all kinds of jurisdictions—large cities, surburban counties and communities, and small towns. Some apply only to certain categories of employees; others apply to all employees. Some have the effect of preventing middle class flight to the suburbs; others have the effect of fencing out the urban poor. Some may promote racial balance, while others tend to prevent it.[4]

We believe that the constitutional issues raised by such residence requirements require fuller consideration than this Court gave to them in *McCarthy*. More than 12 million employees (approximately 14 per cent of the nation's workforce) are now employed by state and local governments, and the number is growing. The increasing adoption of residence requirements for such employees is creating an ever-expanding class of workers who, contrary to the normal expectations of a free society, are precluded by government decree from freely choosing where they wish to live. The constitutional

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[4] While residence requirements have been justified in many instances as a means of promoting racial or ethnic balance by preventing government employees from moving out of the urban jurisdictions in which they work (see *Wright* v. *City of Jackson, Mississippi*, 506 F.2d 900, 903 (5th Cir. 1975); *Ector* v. *City of Torrance*, 10 Cal. 3d 129, 514 P.2d 433, 436 (1973)), *cert. denied*, 415 U.S. 935 (1974), the fact is that over one-fourth of the Nation's suburban jurisdictions—where housing is generally not sufficiently available for low-income and minority groups—impose residency requirements on all public employees. See fn. 2, *supra;* U.S. Commission on Civil Rights *Equal Opportunity in Suburbia* (1974), p. 34. Moreover, even as applied to employees of large cities, such rules have the effect of precluding minority employees from moving to the suburbs, thus impeding suburban integration.

questions involved should be given full plenary consideration by this Court.

II.

This Court's brief opinion in *McCarthy* has left unclear the standards by which the constitutionality of residence requirements for public employees are to be judged. Since the question is an important and recurring one, we urge the Court to take the opportunity offered by this case to clarify the matter.

In a series of cases which preceded *McCarthy,* the Court recognized the constitutional right of all citizens freely to migrate and settle where they choose. *Shapiro* v. *Thompson,* 394 U.S. 618 (1969); *Dunn* v. *Blumstein,* 405 U.S. 330 (1972); *Memorial Hospital* v. *Maricopa County,* 415 U.S. 250 (1974). The Court held that "any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a compelling government interest, is unconstitutional." *Shapiro* v. *Thompson, supra,* 394 U.S. at 634. Although the right involved in those cases is frequently referred to as a "right to travel," it is not movement *per se* which those cases protected, but rather the right to choose one's place of abode. This is one of those freedoms—like "the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience"—which the Court has recognized to be "essential to the orderly pursuit of happiness by free men." *Meyer* v. *Nebraska,* 262 U.S. 390, 399 (1923). Surely, for example, a municipality could not enact an ordinance restricting the

right of citizens to move their residence into or out of the community.[5]

In *McCarthy,* however, the Court seemed to hold that the constitutional standard applied in *Shapiro, Dunn,* and *Memorial Hospital* was not applicable to residence requirements for public employees. The Court distinguished those cases on the basis that they all involved a requirement that a person reside in the jurisdiction for a specified period of time in order to be eligible for certain public benefits, rather than a requirement of residence *simpliciter.*

We submit that this distinction is not sufficient in itself to justify the application of a different *standard.* To be sure, *Shapiro, Dunn,* and *Memorial Hospital* did all involve durational residence requirements, and no issue was raised in those cases as to the validity of any simple residence requirement. But the holding of those cases is that any rule which penalizes a person's right to live where he chooses must be justified by a compelling governmental interest. Indeed, the language of the opinion in *Shapiro* clearly implied that this test would be applicable to *both* durational and simple residence requirements:

> "We imply no view of the validity of the waiting period *or* residence requirements determining

[5] Since the right involved is not derived exclusively from the interstate commerce clause, see *Shapiro* v. *Thompson,* 394 U.S. at 630 n. 8, it would not appear to be limited solely to interstate migration. Although this Court has not previously been confronted with a case involving intrastate migration, two court of appeals cases (both cited with general approval in *Memorial Hospital*) have recognized that the same constitutional principles apply to both interstate and intrastate migration. *King* v. *New Rochelle Municipal Housing Authority,* 442 F.2d 646 (2d Cir. 1971), *cert. denied,* 404 U.S. 863 (1971); *Cole* v. *Housing Authority of City of Newport,* 435 F.2d 807 (1st Cir. 1970).

> eligibility to vote, eligibility for tuition-free education, to obtain a license to practice a profession, to hunt or fish and so forth. Such requirements may promote compelling state interests on the one hand, or, on the other, may not be penalties upon the exercise of the constitutional right of interstate travel." 394 U.S. at 638, n. 21 (emphasis in original).

Similarly, in *Dunn,* the Court noted that "States may show an *overriding interest* in imposing an appropriate bona fide residence requirement on would-be voters," and that "[a]n appropriately defined and uniformly applied requirement of bona fide residence may be necessary to preserve the basic conception of a political community and therefore could withstand *close constitutional scrutiny.*" 405 U.S. at 343 n. 13, 343-44 (emphasis added).[6]

It may be that, in some situations, a residence requirement for public employees can be justified in terms of a compelling governmental interest. Perhaps the result reached in *McCarthy* and other cases involving large cities can be explained in this manner. But to the extent that *McCarthy* suggests that the compelling interest standard is not applicable in such cases, it appears to conflict with *Shapiro, Dunn,* and

[6] The Court also cited with approval the dissenting opinion in *Fontham* v. *McKeithen,* 336 F. Supp. 153, at 167-68 (E.D. La. 1971, 3-judge court), in which Judge Wisdom discussed the residence requirement for voting upheld in *Pope* v. *Williams,* 193 U.S. 621 (1904), and concluded that although *Pope* was "decided long before the dawning of the age of equal protection," the case "is consistent with the compelling interest test" as applied in more recent cases.

Memorial Hospital, thereby leaving the law in a state of confusion.

McCarthy also seemed to suggest that a public agency may have a greater right to control the residence of its own employees than it does to restrict the movement of the citizenry at large. See 424 U.S. at 646 n. 6. We recognize that, in judging a residence requirement which applies only to employees, different interests must be balanced than those which would be considered in testing a rule applicable to all citizens. Nevertheless, the basic constitutional standard should be the same—*i.e.*, to be valid, the requirement involved must serve a compelling governmental interest. The Court has emphatically rejected the notion that a public employee can be made to forfeit his constitutional rights as a price of his employment. *E.g., Perry* v. *Sindermann,* 408 U.S. 593 (1972); *Elrod* v. *Burns,* 96 S.Ct. 2673 (1976). Just two years ago, the Court struck down a mandatory maternity leave policy applicable to public employees as an "unwarranted governmental intrusion" upon "freedom of personal choice in matters of marriage and family life [which] is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment." *Cleveland Board of Education* v. *LaFleur,* 414 U S. 632, 639-40 (1974). In reaching this result, the Court applied the same standard it had previously developed in cases not involving public employees.

The Court's treatment of the residence requirement involved in *McCarthy* seems inconsistent with its treatment of the maternity leave policy involved in *LaFleur*. Surely, the right to live where one chooses is also a matter of "personal choice in . . . family life" which is deserving of constitutional protection. And loss of

public employment is an even more severe penalty than the leave of absence involved in *LaFleur.*[7]

In short, whatever the validity of the result reached in *McCarthy,* the reasoning by which the Court reached that result is difficult to reconcile with prior precedents. The lower courts are therefore left without clear guidance as to how to judge the constitutionality of residence rules which, like the one involved in this case, arise in factual contexts wholly different from the one involved in *McCarthy.* We urge the court to clarify the matter in this case.

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[7] The maternity leave policy at issue in *LaFleur* was held invalid because it created "a conclusive presumption that every pregnant teacher who reaches the fifth or sixth month of pregnancy is physically incapable of continuing." 414 U.S. at 644. See also *Vlandis* v. *Kline,* 412 U.S. 441 (1973); *Stanley* v. *Illinois,* 405 U.S. 645 (1972); *United States Dept. of Agriculture* v. *Murry,* 413 U.S. 508 (1973). Similarly, as we argued below, the residency rule in this case created a "conclusive presumption" that a nonresident of the school district cannot adequately perform the duties of a school counselor, even though there was evidence that, in fact, petitioner's performance had been entirely satisfactory. The Court of Appeals, however, refused to apply the conclusive presumption doctrine in this case, noting that this Court's decision in *Weinberger* v. *Salfi,* 422 U.S. 749 (1975), had "disapproved extension of the doctrine which would make it destructive of numerous legislative judgments in drawing lines." (14a.) But as we read *Weinberger,* it only disapproved extension of the conclusive presumption doctrine to cases which did not involve constitutionally protected rights. The Court noted that *LaFleur* and *Stanley* both involved conclusive presumptions which affected basic constitutional liberties, while *Weinberger* merely involved "a noncontractual claim to receive funds from the public treasury [which] enjoys no constitutionally protected status . . ." 422 U.S. at 771-72. We believe that the present case, like *LaFleur* and *Stanley,* also involved a constitutionally protected right, namely, the right to choose one's place of residence. If that view is correct, it would follow that the conclusive presumption doctrine applied in those cases is also applicable here, and constitutes an additional reason why the residency requirement cannot stand.

III.

Even if the court below was correct in holding that the constitutionality of residence requirements for public employees is to be determined under the "rational basis" standard rather than the "compelling governmental interest" test, this Court should grant review in this case to determine the manner in which that standard should be applied. Guidance is needed from this Court as to precisely what kinds of justifications may provide a "rational basis" for a residence requirement, and how closely a court must scrutinize any asserted justifications to determine whether they are bona fide, and whether they have any basis in fact.

In the present case, the Court of Appeals accepted at face value the justifications put forth by school officials in an affidavit, even though those justifications were "not articulated until during the preparations in this case." (12a.) This Court should consider whether, in such a situation, there should at least be some showing that the asserted justifications were actually the reasons why the rule was originally adopted, rather than mere *post hoc* rationalizations.

Moreover, the courts below made no effort to determine whether the asserted justifications had any basis in fact. For example, respondents claimed that [c]ertain services were not being provided . . . because the counsellor lived outside [the] attendance area." They also asserted that it was "difficult for parents and students to get in touch with the counsellor because of the distance problem." Petitioner's affidavit and deposition, however, tended to contradict these assertions. On review, this Court should determine whether it

was proper for the court below to assume the truth of respondents' contentions and to deny petitioner any opportunity to have a trial of these issues.

The need for more careful scrutiny of respondents' asserted "reasons" is especially evident in this case where the residence requirement was admittedly influenced by a concern that "feelings are generated in the community that the counsellor is an 'outsider' and his allegiance to the high school is in jeopardy as a result of living in another county." This kind of provincial prejudice against "outsiders" is surely not a rational basis for restricting the right of a public employee to choose his place of residence—particularly where (as here) the employee has maintained a lifelong residence in the general area.

In a number of recent cases this Court has recognized that, even where the "compelling governmental interest" test is not applicable, a "stricter scrutiny" is to be exercised "when statutory classifications approach sensitive and fundamental personal rights." *Weber* v. *Aetna Casualty & Surety Co.*, 406 U.S. 164, 172 (1972). In such cases, the Court has closely examined the facts and circumstances surrounding the challenged rule in order to determine whether the rule in fact served the governmental purpose which was asserted as its justification. For example, in *Jimenez* v. *Weinberger*, 417 U.S. 628 (1974), the Court refused to accept at face value the contention that a rule disqualifying certain illegitimate children from eligibility for Social Security disability benefits was justifiable as a means of preventing spurious claims. On the basis of its own examination of the underlying facts, the Court concluded that the disqualified class of

illegitimates was no more likely to assert spurious claims than other classes which were not disqualified. *Id.* at 637. The Court also cited the absence of any evidence to indicate that permitting the disqualified illegitimates to receive benefits would significantly reduce available funds. *Id.* at 633. See also *Stanton* v. *Stanton*, 421 U.S. 7 (1975); *Weinberger* v. *Weisenfeld*, 420 U.S. 636 (1975); *United States Dept. of Agriculture* v. *Moreno*, 413 U.S. 528 (1973); *Eisenstadt* v. *Baird*, 405 U.S. 438 (1972); *James* v. *Stranger*, 407 U.S. 128 (1972); *Reed* v. *Reed*, 404 U.S. 71 (1971).

If the "rational basis" standard rather than the "compelling governmental interest" standard is to be applied to residence requirements for public employees, then the justifications which are claimed to provide such a "rational basis" should at least receive the same careful examination by the court as was given in the foregoing cases. It is all to easy for a school system or other government body to assert justifications which may appear to be plausible on their face, but which cannot withstand scrutiny. Even if the right of a governmental employee to live where he chooses is not deemed to be a "fundamental right," it should at least be treated as an important personal liberty entitled to some meaningful judicial protection.

CONCLUSION

For the reasons stated, petitioner prays that this petition for certiorari be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

C 74-2

GRANT MOGLE, *Plaintiff*,

v.

BOARD OF EDUCATION OF SEVIER COUNTY SCHOOL DISTRICT, et al., *Defendants*.

Order Granting Motion for Summary Judgment

(FILED OCTOBER 23, 1974)

The above-entitled cause came on to be heard on motion of defendants for a summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure on the 11th day of October, 1974, before this court. The court, having considered the pleadings in the action together with affidavits attached to the motion, the depositions, interrogatories and answers thereto and other discovery proceedings, and having heard oral arguments from the parties, is fully advised in the premises.

It is the conclusion of this court that no substantial federal question is raised by plaintiff's claim and hence the cause of action does not come within the jurisdiction provision relied upon by plaintiff. Therefore,

IT IS HEREBY ORDERED that defendants' Motion for Summary Judgment be granted, and that the above-entitled matter be dismissed as to all defendants.

DATED this 23 day of October, 1974.

/s/ ALDON J. ANDERSON
Aldon J. Anderson
United States District Judge

UNITED STATES COURT OF APPEALS, TENTH CIRCUIT

No. 74-1862

GRANT MOGLE, *Plaintiff-Appellant,*

v.

SEVIER COUNTY SCHOOL DISTRICT; SEVIER COUNTY SCHOOL DISTRICT BOARD OF EDUCATION; LELAND L. TEEPLES, Superintendent, Sevier County School District; LAMONT L. BENNETT, Former Superintendent, Sevier County School District; WILLIAM GREENWOOD, President, Sevier County School District; MYRON MADSEN; DAN MANNING; ROBERT NIELSON and KENNETH GLOVER, Members, and FLOYD JOHNSON, a Former Member, of the Sevier County School District Board of Education; and EACH OF THE ABOVE NAMED INDIVIDUALS JOINTLY AND SEPARATELY AS OFFICERS AND EMPLOYEES OF THE SEVIER COUNTY SCHOOL DISTRICT and AS INDIVIDUALS IN THEIR PRIVATE CAPACITY, *Defendants-Appellees.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

(D. C. No. C-74-2)

(Decided August 11, 1976)

Before HILL, HOLLOWAY and DOYLE, *Circuit Judges*

HOLLOWAY, *Circuit Judge*

Plaintiff-appellant, Grant Mogle, brought this civil rights action under 42 U.S.C.A. §§ 1983 and 1985 against the Board of Education of Sevier County, Utah, the current superintendent of the Sevier County School District, Mr. Teeples, a former superintendent, Mr. Bennett, and the President and individual members of the Board of Education, all persons being sued in their official and individual capacities. Plaintiff alleged that he was unconstitutionally deprived of his employment as a school teacher and counselor as a result of the defendants' collective refusal to renew his employment contract and their refusal to reinstate him to his position of employment unless the plaintiff moved into and lived in the "North Sevier area." The complaint avers that the amount in controversy exceeds $10,000, exclusive of interest and costs, and claims jurisdiction under 28 U.S.C.A. §§ 1331 and 1343.

The amended complaint alleges that the imposition, into plaintiff's employment contract, of the condition that he live in the North Sevier area was arbitrary, capricious and unreasonable, violated his "rights to live where he chooses and to travel freely" and served no permissible governmental objective in that it bears no relationship to the effective or satisfactory performance of plaintiff's employment duties, all in violation of the Fifth and Fourteenth Amendments. Mogle sought injunctive relief for reinstatement and compensatory and punitive damages.

On the answers to interrogatories, admissions, depositions and affidavits, the trial court granted the defendants' motion for summary judgment. The court concluded that "no substantial federal question is raised by plaintiff's claim and hence the cause of action does not come within the jurisdictional provisions relied upon by the plaintiff." Plaintiff appeals from this summary judgment dismissing the cause.

I

THE FACTUAL BACKGROUND

The plaintiff's deposition showed the following facts:

Grant Mogle was employed as an elementary school teacher by the Sevier County School Board under annual contracts from 1964 to 1968. He did not teach during the 1968-69 school year because he went into business with his father for one year. In the Spring of 1969 Mogle was approached by Roger Nielson, principal of North Sevier

High School, and asked if he would be interested in a counseling job at the high school. Mogle accepted the position and began work in the fall of 1969. The amended complaint states that plaintiff accepted a counseling position in the 1969-70 school year, and alleges that plaintiff is entitled to be reinstated as a counselor with a salary and benefits commensurate with that which he would have had, had he not been unlawfully terminated (R. Vol. III, 146-154). Mogle's deposition shows that he spent a substantial portion of his time teaching in addition to counseling.

At the time he was hired Mogle resided in Centerfield, Utah, a town approximately eleven miles from Salina, Utah, the location of North Sevier High School. Centerfield had a population of about 420 and is located within Sanpete County. Salina had a population of about 1500 and is located in Sevier County.[1]

When Mogle first discussed the job with defendant Superintendent Bennett, there was some mention of Mogle's moving within the boundaries of the school district. According to Mogle, Bennett said, "we would like you to move over." Mogle assumed "over" meant into the North Sevier area. Mogle said Bennett put no time limitation on the requested move, expressed no sense of urgency about it, and gave no reasons for the request. Mogle said the request bothered him but that he did not express any objection to Bennett. Mogle did mention Bennett's request to Mr. Nielson, the Principal of North Sevier High School. According to Mogle, Nielson thought the move was unnecessary, for he was concerned only that Mogle be able to get to school and perform assigned responsibilities.

Superintendent Bennett next mentioned the residency issue to Mogle some time around Christmas of 1971. Bennett was visiting North Sevier High School that day

[1] The 1970 decennial census showed a population of 419 for Centerfield and 1494 for Salina.

and asked Mogle when he was going to move. Bennett apparently expressed his view that Mogle had been given enough time and that he ought to be moving soon. Mogle replied that he and his family were trying to find a place to live in Salina, but they were encountering difficulty due to a tight housing market and a lack of finances.[2] Bennett suggested a mobile home or a prefabricated home as a possible alternative; he gave Mogle no ultimatum at this time.

A similar discussion took place in March, 1972, at which time Bennett told Mogle that a contract for the coming year, 1972-73, might not be offered if Mogle didn't move. Again Mogle replied that he was trying to find a new home. Mogle's deposition states that he definitely knew after this conversation that he would have to move if he was to have a job for the coming year.

Mogle, troubled by Bennett's request, inquired of one of his neighbors in Centerfield, a Mrs. Frandsen, who was also a teacher employed by the Sevier School Board, whether she had been confronted with this kind of request or ultimatum. He received a negative reply. Mogle then requested the School Board to grant him a few minutes of time at their next regularly scheduled meeting on April 27, 1972, in order that he might present his problem.

Mogle appeared at the Board meeting and presented a written proposal. According to Mogle, a discussion ensued during which the Board expressed its general concern that Mogle was paying taxes in Sanpete County while getting paid in Sevier County. He said the main issue seemed to be that he ought to be living in Sevier County if that was where he was going to get paid. Mogle also says "they

[2] Mogle is married and lives with his wife and six children. He says that throughout his final teaching year he had difficulty finding a suitably large house in the Salina area.

thought I ought to be in the community but they didn't say for what reason." Mogle recalled that defendant Manning was particularly strong in his statements "about that," apparently referring back to the concern over the taxing location.

Mogle brought up the fact that his neighbor, Mrs. Frandsen, wasn't subject to the announced policy. He said the Board explained this away by replying that she was hired when teachers were hard to get and it was thought she would only stay for one year. Mogle said he was led to believe there was a policy on residency regarding only him; he was greatly disturbed that the policy, if it existed, didn't apply to all teachers. Mogle said he had no prior knowledge of any such policy and that none was discussed with him at the time he was hired. He said he had made an inquiry to one of the Board members, defendant Glover, concerning the origin of the policy and defendant Glover answered that he didn't know.

When Mogle received his 1972-73 school year contract in the latter part of May, 1972, the following sentence was typed into paragraph 6:

> For this contract to be valid [the teacher] must be living in the North Sevier area by the beginning of the 1972-73 school year (Vol. III, p. 11).

The school year was scheduled to begin for Mogle on August 11, 1972. Mogle signed and returned the contract with the intention of making a good faith effort to comply with the residency provision (See Mogle's Deposition, 60-61).

At this point the Mogles increased their efforts to find a house in Salina. They listed their own home for sale and found one house in Salina they were very near purchasing. However, they were unable to obtain F.H.A. approval of the necessary loan because the home was too small for their size family. Mogle spent much of the time

during the summer of 1972 in Provo, Utah, at Brigham Young University finishing the requirements for his master's degree, but he did spend time looking for another home in Salina (Id. at 60-61).

After these difficulties in his efforts to move, Mogle phoned Bennett early in August to report on his troubles. Bennett replied that he would have to discuss the problem with the school board at its regular meeting on August 10. Mogle was later informed by his wife that Bennett had called while Mogle was in Provo and had "told her the board had met and that it was their decision they would let me go unless I was there on the date specified." Bennett left word with Mogle's wife "that if there was any change in my particular moving circumstances by the next day to let him know."

Mogle had contacted the Utah Education Association in May, 1972, about his troubles. Mr. Walters, an official of the Association, made several contacts with the Board on Mogle's behalf. His deposition states that Walters asked Superintendent Bennett why they didn't apply the policy to Mrs. Frandsen; that Bennett said she was hired when it was hard to get teachers, and they didn't think she would be employed more than a year or two; that she had been with them for many years and therefore they did not place the stipulation on her. Walters said they were being unfair and discriminatory, and Bennett said they were prepared to take it to court.

Later Walters asked the new Superintendent, Mr. Teeples, to produce any written policy on the point, and Teeples said they didn't have one in writing. When Walters appeared before the Board, he was told that although they didn't have an official policy in writing and another teacher lived outside the district, they were going to enforce the policy. The contacts with the Board were unavailing and plaintiff brought this suit in January 1974.

Among other things, the defendants asserted that there was a policy requiring counselors to reside in the proximity of the school where they serve. The reasons for the Board's policy and actions were stated in the affidavits of Superintendent Bennett and Superintendent Teeples.[3] Essentially the reasons concerned the difficulties of parents and students getting in touch with the counselor because of distance problems; the difficulty of non-resident counselors getting acquainted with parents and students; difficulty in the counselor's acquaintance with community problems; limitation of knowledge of career opportunities; inability to make contribution to community activities; and inconvenience due to the distance from students records, and the like.

Plaintiff Mogle filed an opposing affidavit in which he stated that the defendants' affidavits presented the "first opportunity plaintiff has had to examine the reasons advanced by any of the defendants for requiring him to reside within the defendant school district and plaintiff was never advised of any of these reasons prior to the date his employment was terminated." (R. III, 157). The affidavit further stated that:

> As counselor and part-time coach, he [plaintiff] was available at the North Sevier High School early in the mornings until late in the afternoons of each school day. Never during his employment with defendant School Board, was he asked by any person employed by the defendant Board of Education to work longer hours or to make himself more available to the students or faculty members of the High School.
>
> (R. III, 157)

[3] Portions of the affidavits expressing the reasons for the decision are reproduced in the appendix to this opinion.

The plaintiff also stated:

> He [plaintiff] lives and at the time his employment was terminated by the defendant Board of Education, he lived only eleven miles from North Sevier High School where he was employed. At the time he was employed by the Board of Education he knew the community in which he taught and was available in all and any special problems which in any way related to his job.
>
> At no time did any member of the Board of Education of Sevier County or any of its employees inform him that he was not doing a good job or that he was required to be more readily available to the students, faculty or community in which the High School was located.
>
> (R. III, 158-59)

The trial judge concluded that "no substantial federal question is raised by plaintiff's claim and hence the cause of action does not come within the jurisdictional provision relied upon by plaintiff." The court granted the defendants' motion for summary judgment and dismissed the matter as to all defendants, and plaintiff appealed from that ruling.

As we turn to the appellate contentions, we must note that where different ultimate inferences may properly be drawn, the case is not one for summary judgment. United States v. Diebold, 369 U.S. 654, 655. Summary judgment papers must be viewed in the light most favorable to the party opposing the motion. Frey v. Frankel, 361 F.2d 437, 442 (10th Cir.). Moreover, the right to a summary judgment must be shown by the moving party beyond a reasonable doubt. See Mustang Fuel Corp. v. Youngstown Sheet & Tube Co., 516 F.2d 2133, 36 (10th Cir.). We have reviewed the facts in considerable detail in order to apply these rules in considering this appeal.

II.

The Equal Protection Challenge

Plaintiff strenuously urges that the residency requirement imposed on one occupation, school counselors—and in practical effect on only one person—violates the Equal Protection Clause. He challenges the classifications creating a distinction between resident and non-resident counselors. He argues that the policy and decision applied to him are so arbitrary and discriminatory, and so lacking in any rational justification as to constitute a deprivation of equal protection, relying on Shapiro v. Thompson, 394 U.S. 618; Dunn v. Blumstein, 405 U.S. 330; Memorial Hospital v. Maricopa County, 415 U.S. 250; Hanson v. Unified School District, 364 F. Supp. 330 (D.Kan.), and similar cases.[4]

At the outset we must consider the standard to follow in deciding the claim under the Equal Protection Clause. It is true that durational residency requirements were reveiwed in *Shapiro, Dunn* and *Memorial Hospital* under the compelling governmental interest test. We are persuaded, however, that now it is reasonably clear that a continuing residency requirement is instead subjected to the

[4] Since argument the plaintiff submitted a Supplemental Memorandum addressing the recent decision in McCarthy v. Philadelphia Civil Service Commission, — U.S. —, 44 U.S.L.W. 3530, decided March 22, 1976. The memorandum recognizes that some arguments advanced earlier by plaintiff are not available after *McCarthy* but clearly it does not abandon the primary challenge to the residency policy under the Equal Protection Clause. While it speaks of being precluded from relying on the Due Process Clause by our recent decision in Weathers v. West Yuma School District, 530 F.2d 1335 (10th Cir.), we do not understand the plaintiff to withdraw its challenge under the conclusive presumption cases (See Appellant's Supplemental Memorandum submitted May 10, 1976, especially p. 4, n.1).

We also read the briefs and the Memorandum as continuing to argue that the compelling governmental interest test applies in giving constitutional scrutiny to the policy in question.

less scrutinizing standard generally applied in equal protection cases. We feel this is shown by the Court's recent decision in McCarthy v. Philadelphia Civil Service Commission, — U.S. —, 44 U.S.L.W. 3530, considered in conjunction with its earlier ruling in Detroit Police Officers Assn. v. City of Detroit, 405 U.S. 950, dismissing for want of a substantial federal question the appeal from the decision of the Michigan Supreme Court in Detroit Police Officers Assn. v. City of Detroit, 190 N.W.2d 97.

The Michigan Court appears to have decided and rejected the equal protection challenge to the continuing residency requirement as applied to Detroit police officers under the general formulation of the equal protection standards, saying that the classification was not "invidious" and was "at least debatably productive of proper municipal goals." 190 N.W. 2d at 97-99. No analysis was made in terms of any compelling interest, and the Court found no infringement on interstate travel or similar fundamental rights. The Supreme Court has referred expressly to the authoritativeness of its dismissal of the appeal. See *McCarthy*, — U.S. —, —; see also Hicks v. Miranda, 422 U.S. 332. We feel that the ruling in *Detroit Police Officers Ass'n* must imply approval of the standard applied, since if a higher test were required, the result might well be different. Moreover, the opinion in *McCarthy* itself speaks of having held "that this kind of ordinance is not irrational." — U.S. —. And *McCarthy* simply differentiates between a requirement of continuing residency and a requirement of prior residency of a given duration in rejecting the claim of impairment of the constitutional right to interstate travel. Without such a right being involved, the general rational basis test applied. See also Wardwell v. Board of Education of Cincinnati, 529 F.2d 625, 628 (6th Cir.), cited in *McCarthy*.

Under the traditional standard, the classification challenged here—differentiating between resident and non-

resident counselors—must at a minimum bear some rational relationship to a legitimate state purpose. Weber v. Aetna Casualty & Surity Co., 406 U.S. 164, 172. Moreover, the policy is presumed to be constitutional even if source materials normally resorted to for ascertaining its grounds are silent; and its classifications will "be set aside only if no grounds can be conceived to justify them." See McDonald v. Board of Election, 394 U.S. 802, 809.

It is true that there was no written rule or policy on the residency requirement in this case. The reasons for the rule were apparently not articulated until during the preparations in this case. Nevertheless, there are grounds stated by the affidavits of Superintendent Bennett and Superintendent Teeples. The residency requirement was related to the difficulty for parents and students to get in touch with the counselor because of distance problems; the difficulty for parents and students to become personally acquainted with the counselor; the difficulty in the counselor's becoming acquainted with the community and its problems; the inability of the non-resident counselor to make contribution to community activities; and, the counselor being responsible for cumulative student records, the inconvenience for him to live a long distance from where the records are kept. See Appendix to this opinion.

Plaintiff refers to his opposing affidavits and deposition showing his availability at the school from early each morning until late each afternoon, and to the absence of any statement by Board members that he was not doing a good job or that he was required to be more readily available to students and others. We note also that there was only an eleven mile distance from his home to Sevier and agree, too, that the very small communities involved present no problems of the magnitude of those of large cities. Nevertheless, the reasons for the policy as given by the defendants are not wholly insubstantial. We must accord the policy and the classifications the usual presumption of validity and they may be set aside only if no grounds can

be conceived to justify them. McDonald v. Board of Election, 394 U.S. 802, 809.

We must hold that, although the grounds to support the classifications are less substantial than those outlined in Wardwell v. Board of Election, 529 F.2d 625, 628 (6th Cir.), the policy and decision applied to plaintiff do not violate the Equal Protection Clause.

III

The Conclusive Presumption Challenge

Plaintiff argues further that the residence requirement violated his right to due process by creating a conclusive and irrebuttable presumption that he could not properly perform his duties unless he resided within the school district, relying on Vlandis v. Kline, 412 U.S. 441; Cleveland Board of Education v. LaFleur, 414 U.S. 632, and other similar cases.

We cannot agree. As the Court noted in *Vlandis*, supra at 452, the State there purported to be concerned with residency in allocating differing tuition rates. It classified students for the purpose of this fact by permanent and irrebuttable presumptions, e.g., non-residency was established if the unmarried student had a legal address outside the State for any part of the year immediately prior to his application. *LaFleur* involved the Cleveland requirement of a teacher's taking maternity leave without pay beginning five months before the expected birth of her child and prohibiting her return until sometime after the child reaches the age of three months. The requirement decided the fact and duration of incapacity by an irrebuttable presumption.[5]

---

[5] The case also held invalid a similar Chesterfield County provision requiring that leave be taken at least four months before the expected birth. However, the Chesterfield County provision for eligibility to return to teaching by furnishing a medical certificate was upheld. 414 U.S. at 650.

In each case, in effect, a fact question was identified and then decided by a conclusive presumption.[6] In *LeFleur* the Court referred to the irrebuttable presumption concerning a woman's physical incompetency when the medical evidence as to an individual woman's physical status might be wholly to the contrary. See 414 U.S. at 644, 649, n. 15. In *Vlandis* it spoke of the fact that the presumption of non-residence was not necessarily or universally true in fact. See 412 U.S. at 452. The factual presumptions in both cases were held unwarranted and a denial of due process.

In our case, the residency requirement does not involve such identification of a controlling fact question and decision of it by an irrebuttable presumption. There are numerous factors that may undergird the policy and the line drawn by the Board. It is not shown that application of the policy to this plaintiff involves a presumption against him on any particular point. In such a case, we do not feel the conclusive presumption doctrine was intended to apply. The Supreme Court has disapproved extension of the doctrine which would make it destructive of numerous legislative judgments drawing lines. See Weinberger v. Salfi, 422 U.S. 748, 772.

Initially plaintiff also argued, as a separate point, that the Board's determination was so arbitrary and capricious as to deny due process. However, he now states that our decision in Weathers v. West Yuma County School District, 530 F.2d 1335 (10th Cir.), precludes such reliance by him on the Due Process Clause and we need not reach that point.

---

[6] The essentials of a presumption of fact were present: an inference about the existence of a fact not proven (a presumed fact) from the existence of another fact which has been proven (basic fact). See 4 J.Wigmore, Evidence § 1356(a) (Chadbourne rev. 1972). However, such a presumption normally is rebuttable by presentation of contrary evidence. 9 id. § 2490 (3d ed. 1940).

We are unable to agree with the trial court's view that no substantial federal question was presented. Nevertheless, under the constitutional standards we must apply, we feel that summary judgment for the defendants was proper.

AFFIRMED.

Appendix

The affidavit of defendant Superintendent Bennett stated that the decisions to insert and enforce the contractual provision:

> were based entirely and exclusively upon the necessity to obtain the services of a counsellor who resided in close proximity to the school where he served and the compelling interest of having a counsellor who did not have both his residence and substantial other outside employment and occupation in another community.
>
> (R. III, 168).

Bennett's affidavit further stated:

> A. The Board of Education has never at any time maintained a policy that no teacher residing outside Sevier County or Sevier County School District could be employed or teach within the District.
>
> B. The School District has had, at all times material to this action, a policy that counsellors must reside in the proximity of the school where they serve and those are based upon the following considerations:
>
> Certain services were not being provided students in the North Sevier High School attendance area because the counsellor lived outside that attendance area;
>
> It is difficult for parents and students to get in touch with the counsellor because of the distance problem;

It s difficult for parents and students to become personally acquainted with the counsellor;

It is more difficult because of folk-ways and mores for the counsellor to become acquainted with the community and its problems and feelings are generated in the community that the counsellor is an "outsider" and his allegiance to the high school is in jeopardy as the result of living in another county;

The counsellor's knowledge of career opportunities is more limited because he is not living in the community and having first hand knowledge of those career activities;

The counsellor is unable to make any contribution of services to the community in civic and church activities, is not immediately available for personal contact by police officers, clergymen, doctors, principals, and other service agencies and a long distance phone call is required if a counsellor is contacted at home by students or parents or both;

A counsellor is responsible for cumulative records of the students and it is inconvenient for him to live a long distance from where the records are kept; there is a substantial demand upon student record data in spring and early fall.

(R. III, 168-69)

The affidavit of defendant Superintendent Teeples restated the above reasons for the school board's policy, and offered these additional comments:

The Board of Education has and in 1972 had a policy, however, requiring guidance counsellors to live in close proximity to the school where they are employed and the reasons therefor are that the school counsellor is the psychological hub of the school from which all

lines of communication extend to both the faculty and to the student body. The counsellor's availability and familiarity with the local community are requisite to his effective performance. A commuter, and particularly one who has virtually full-time employment totally disassociated with his school's activities and also located in another community and one who would be, after school hours, totally preoccupied with the combined problems of commuting and the requirements of that disassociated and unrelated work, deprive those desiring his counselling services at critical moments. The counsellor must be readily available to cope with crises the same as a fireman or a policeman. A student's unresolved problem such as a communication breakdown between a student and a faculty member requires immediate attention. A friend, a neighbor and a resident of the community can fulfill the role of counsellor far more effectively than the commuter who maintains the distance he has established between his work involvement and the other world of his residency and his other occupation;

(R. III, 171)

Teeples' affidavit also stated that:

The problems created by commuting, distance, and virtually full time additional employment prevent a face-to-face contact between the counsellor and his students. Some home visits could otherwise be made if the counsellor lived in the student residency area.

(R. III, 172).

Supreme Court, U. S.
FILED
FEB 1 1977
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-7861

GRANT MOGLE,

Petitioner,

v.

BOARD OF EDUCATION OF SEVIER COUNTY SCHOOL DISTRICT, ET AL.,

Respondents,

BRIEF OF RESPONDENTS OPPOSING ISSUANCE OF A WRIT OF CERTIORARI

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In the Supreme Court of the United States

OCTOBER TERM, 1976

No.....

GRANT MOGLE,

Petitioner,

v.

BOARD OF EDUCATION OF SEVIER COUNTY SCHOOL DISTRICT, ET AL.,

Respondents,

BRIEF OF RESPONDENTS OPPOSING ISSUANCE OF A WRIT OF CERTIORARI

Respondents respectfully submit that a Writ of Certiorari should not issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in this case and support their position with the brief hereto annexed in accordance with Rule 24, Rules of the United States Supreme Court.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 540 F2d 478, and has been reproduced in the Appendix to the Petition for Certiorari at p. 2a. The unreported

final order of the District Court, issued without opinion, is reproduced at p. 1a of the Petition for Certiorari.

QUESTIONS PRESENTED

1. Does a contract condition agreed upon following negotiations that a school counselor reside within the school district present any substantial federal question or any question concerning the constitutionally-protected "right of interstate travel"?

2. If any substantial federal question *is* presented by such an agreement, is existence of a rational basis sufficient to justify residence as a condition to employment?

3. Can a rural School Board judge whether or not school counselors should reside in the proximity of the school they agree to serve?

STATEMENT OF THE CASE

FACTS

Petitioner was employed as a teacher on successive one-year contracts. When he was first employed in the capacity of a counselor—again on a one-year contract—he was told he would be expected to move into the "North Sevier" area where the school he was to serve was located. Petitioner agreed to a contract containing that provision.

Petitioner admitted in his deposition that at all times material to this case he was an active partner in a gasoline distributing company in the County of Sanpete where he lived. This fact undoubtedly influenced his decision to repudiate his contract.

Contrary to Petitioner's statement (p. 3 of the brief supporting Petition for Certiorari) that his contract was not renewed for the 1972-73 school year he *was* given a contract in which he agreed to move into the North Sevier area before the school year began. He was told, when he inquired, that the Board expected his compliance with that provision and then refused to report for work when the school year began.

Respondents filed affidavits with the District Court supporting their Motion for Summary Judgment enumerating many reasons why a counselor should live within the area of the school he served. These affidavits were uncontradicted. These are set out in the appendix to the opinion of the Court of Appeals of the Tenth Circuit. That Court observed that those reasons recited that:

> "They were based entirely and exclusively upon the necessity to obtain the services of a counselor who resided in close proximity to the school where he served and the compelling interest of having a counselor who did not have both his residence and substantial other outside employment and occupation in another community."

Other recitals in the affidavits are set out in the Circuit Court's opinion (Appendix) and they include the declarations that:

> The School District has had, at all times material to this action, a policy that counselors must reside in the proximity of the school where they serve and those are based upon the following considerations:

Certain services were not being provided students in the North Sevier High School attendance area because the counselor lived outside that attendance area;

It is difficult for parents and students to get in touch with the counselor because of the distance problem;

It is difficult for parents and students to become personally acquainted with the counselor;

It is more difficult because of folk-ways and mores for the counselor to become acquainted with the community and its problems and feelings are generated in the community that the counselor is an "outsider" and his allegiance to the high school is in jeopardy as the result of living in another county;

The counselor's knowledge of career opportunities is more limited because he is not living in the community and having first-hand knowledge of those career activities;

The counselor is unable to make any contribution of services to the community in civic and church activities, is not immediately available for personal contact by police officers, clergymen, doctors, principals, and other service agencies and a long distance phone call is required if a counselor is contacted at home by students or parents or both;

A counselor is responsible for cumulative records of the students and it is inconvenient for him to live a long distance from where the records are kept; there is a substantial demand

upon student record data in spring and early fall;

The Board of Education has and in 1972 had a policy, however, requiring guidance counselors to live in close proximity to the school where they are employed and the reasons therefor are that the school counselor is a psychological hub of the school from which all lines of communication extend to both the faculty and to the student body. The counselor's availability and familiarity with the local community are requisite to his effective performance. A commuter, and particularly one who has virtually full-time employment totally disassociated with his school's activities and also located in another community and one who would be, after school hours, totally preoccupied with the combined problems of commuting and the requirements of that disassociated and unrelated work, deprive those desiring his counseling services at critical moments. The counselor must be readily available to cope with crises the same as a fireman or a policeman. A student's unresolved problem such as a communication breakdown between a student and a faculty member requires immediate attention. A friend, a neighbor and a resident of the community can fulfill the role of counselor far more effectively than the commuter who maintains the distance he has established between his work involvement and the other world of his residency and his other occupation;

The problems created by commuting, distance and virtually full-time employment additional-

ly, prevent a face-to-face contact between the counselor and his students. Some home visits could otherwise be made if the counselor lived in the student residency area.

DECISIONS BELOW

The District Court granted Defendants' Motion for Summary Judgment which was based upon the foregoing affidavits, the substance of which was not countered. The only affidavits countering the reasons establishing the rational basis for the school policy were statements by Petitioner that in his opinion he could do his work as well as a resident of the North Sevier area. No affidavit was filed countering the rationality of the rule.

The District Court determined to base Summary Judgment on the ground that "no substantial federal question was involved" as this Court had held in *Detroit Police Officers Ass'n. v. City of Detroit, 405 U.S. 950, 92 S. Ct. 1173, 31 L. Ed.2d 227 (1972).*

The United States Court of Appeals for the Tenth Circuit affirmed, concluding that the reasons expressed in the affidavits upon which the motion was based demonstrated that the reasons why the residence provision was inserted in Petitioner Mogle's contract were not wholly insubstantial (540 F.2d 478).

REASONS WHY THE WRIT SHOULD BE DENIED

Petitioner has no constitutional right to be employed by a municipal corporation while he is living elsewhere.

McCarthy v. Philadelphia Civil Service Commission, 424 U.S. 645, 96 S. Ct. 1154, ...L.Ed..... (1976).

Likewise, the policy of the District is not irrational. *Hicks v. Miranda, 422 U.S. 332, 95 S. Ct. 2281, 45 L. Ed.2d 223.*

There is nothing in the record countering, opposing, or contradicting affidavits of the Respondents showing the rational basis for the rule that counselors reside in proximity of the school they serve.

Petitioner is not being denied employment because of any *durational residency requirement.* The Board did not ask any period of residency but only continuing residency. This is not an impingement upon Petitioner's constitutional "right to travel". *Memorial Hospital v. Maricopa County, 415 U.S. 250, 94 S. Ct. 1076, 39 L. Ed.2d 306 (1974).*

The Respondents' requirement that school counselors reside in the District is uniformly applied and the reasons comprehensively expressed in the affidavits upon which the Motion for Summary Judgment was sustained by the Court of Appeals. Rules of this type are not irrational. *Detroit Police Officer's Ass'n. v. City of Detroit, supra.*

Appropriately defined and uniformly applied continuing residency requirements are not questioned by the leading cases relied upon by the Petitioner of *Shapiro v. Thompson, 394 U.S. 618, 89 S. Ct. 1322, 22 L. Ed.2d 600* or *Dunn v. Blumstein, 405 U.S. 330, 92 S. Ct. 995, 31 L. Ed.2d 274* as those cases have been explained in *Memorial Hospital* and *McCarthy, supra.*

Petitioner's counsel openly admit in their brief and in other documents they have filed with this Court, particularly their application for extension of time within which to file a Petition for Writ of Certiorari, that they are not really interested in Mr. Mogle's particular situation but counsel for the National Educational Association, gratuitously furnishing legal services for Mr. Mogle, believe that a climate exists in which they should have a ruling of this Court that their members may hold higher-paid jobs in urban or city school districts and nevertheless reside in suburban or outlying areas.

We respectfully submit that this is not the case for such an examination of the law or a re-examination of the Court's prior opinions, many of which would have to be reversed if the National Education Association obtains the rule which it seeks by asking this Court for briefs and an argument on the extremely narrow issue which was correctly and dispositively resolved by the United States Court of Appeals for the Tenth Circuit.

We respectfully submit that the Petition for Certiorari should be denied.

Respectfully submitted,

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